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No. 07-1523

IN THE

Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States by the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.2, *amicus curiae* American Bar Association ("ABA") respectfully submits this brief in support of petitioner's request that this Court grant certiorari. Specifically, the ABA requests that this Court reconsider its conclusion in the principal precedent at issue in this case – *Apodaca v. Oregon*, 406 U.S. 404 (1972) – that the Constitution does not require jury unanimity for state criminal convictions. While Justice Powell, in his concurrence, cited 1968 ABA Standards as supporting this conclusion, those ABA Standards had been changed by 1976, based on overwhelming empirical data. Over the succeeding thirty-plus years, the Standards have consistently stated that unanimity should be required in all criminal jury trials.

The ABA is the largest professional membership organization and the leading organization of legal professionals. It has over 413,000 members spanning all 50 states and other jurisdictions, and its members include prosecutors, public defenders, members of the

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for the petitioner has consented to the filing of all amicus briefs. A letter from the respondent consenting to the filing of this brief has been filed with the Clerk of this Court. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

federal and state judiciaries, private attorneys, legislators, academics and students.[2]

The ABA's mission "is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." Among its goals are "[t]o promote improvements in the American system of justice."[3]

In pursuing its mission and goals, the ABA has maintained a long-standing commitment to improvements to the American criminal and civil jury trial systems. This commitment has resulted in standards for criminal jury trials that have influenced policymaking and have frequently been adopted and relied on by courts. In fact, Justice Powell's opinion in *Johnson v. Louisiana*, 406 U.S. 366 (1972), which controlled the outcome in *Apodaca*, cited the ABA's Project on Standards for Criminal Justice, Trial by Jury § 1.1 (Approved Draft 1968), in reaching his conclusion that he saw no constitutional infirmity in the Oregon provision permitting less than unanimous verdicts. *Johnson*, 406 U.S. at 376 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*).

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited July 7, 2008).

Based on the ABA's continuing research regarding jury trials, however, the ABA's Commission on Standards of Judicial Administration published its Standards Relating to Trial Courts in 1976, in which Standard 2.10 stated, "The verdict of the jury [in criminal cases] should be unanimous." In the succeeding thirty years, the ABA has not wavered from this standard.

As this Court noted in 2005, it "long ha[s] referred to the[] ABA Standards as guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (internal punctuation and quotation marks omitted). With its deep and long-standing commitment to examining whether criminal jury verdicts should be unanimous, the ABA believes its unique and informed perspective may be of assistance to the Court in this matter.

SUMMARY OF ARGUMENT

Justice Powell, in his concurrence in *Apodaca v. Oregon*, 406 U.S. 404 (1972), determined that the Constitution does not require unanimous jury verdicts in state criminal trials. While this determination was based in part on a 1968 ABA standard that accepted less-than-unanimous verdicts, the ABA changed its Standard in 1976 to affirm that a jury verdict in criminal trials should be unanimous.

Throughout the thirty-plus years since *Apodaca* was decided, the ABA has continued to affirm that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial. Most recently, in 2005, as the result of its American Jury

Project, the ABA adopted nineteen core jury trial principles, one of which provides that a unanimous decision should be required in all criminal cases heard by a jury.

The ABA's standards have always been based on comprehensive review of research and empirical data on the jury's role in the criminal justice system. This work, some of which is discussed below, has led the ABA to conclude that a non-unanimous decisional process reduces the reliability of jury determinations, silences minority viewpoints, erodes confidence in the criminal justice system, and does not significantly contribute to a reduction in hung juries and retrials.

Because each member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints and community confidence in jury verdicts, and because the ABA's review of research and empirical data, as well as the consensus of the legal community, has concluded the opposite occurs through a non-unanimous decision process, the ABA supports petitioner's request that *Apodaca* be revisited.

ARGUMENT

I. ABA STANDARDS AFTER 1976 AND ITS 2005 PRINCIPLE ON JURY UNANIMITY FOR CRIMINAL TRIALS SUPPORT RECONSIDERATION OF *APODACA*.

A. *Apodaca* Relied On The 1968 ABA Standards.

As petitioner explains, this Court's decision in *Apodaca* permitting non-unanimous jury verdicts in

state criminal trials was the product of an unusual combination of disparate positions, in which five Justices agreed that the Sixth Amendment requires unanimous jury verdicts, and eight Justices agreed that the Sixth Amendment applies in full to the states. *See* Pet. 7-11. Notwithstanding this agreement, Justice Powell's separate opinion, and thus this Court's judgment, concluded that the Constitution does not require states to convict by unanimous verdicts.

Justice Powell viewed the unanimity question as requiring "a fresh look at the question of what is fundamental in jury trial." *Johnson*, 406 U.S. at 376 (Powell, J., concurring in the judgment). Justice Powell determined that deviation from the constitutional standard of unanimity for federal convictions was appropriate in part because "[l]ess-than-unanimous verdict provisions . . . have been viewed with approval by the American Bar Association's Criminal Justice Project." *Johnson*, 406 U.S. at 377 & n.19 (citing *ABA Standards for Criminal Justice, Trial by Jury*, Standard 1.1 (Approved Draft 1968) (hereinafter "*1968 Criminal Justice Standards*")).

In 1972, when *Apodaca* was decided, Standard 1.1 of the *1968 Criminal Justice Standards* provided, in pertinent part:

> 1.1 Right to jury trial.
>
> Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited in one or more of the following ways:

* * * *

(d) by permitting less than unanimous verdicts, without regard to the consent of the parties.

In the Commentary to the 1968 Criminal Justice Standard 1.1, the Advisory Committee reviewed current thinking on jury unanimity and "concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, as now permitted in six states." 1968 Criminal Justice Standards, *supra*, at 28.[4]

The *1968 Standards for Criminal Justice, Trial by Jury,* was but one volume – volume 15 – of the seventeen volumes that comprised the ABA's *Project on Standards for Criminal Justice.* In 1974, on the occasion of publication of a compilation of the "black letter" standards of all seventeen volumes, Chief Justice Warren E. Burger noted, "The Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." *Introduction: The ABA Standards for Criminal Justice,* 12 Am. Crim. L. Rev. 251, 252 (1974).

B. By 1976, The ABA Had Concluded That Unanimous Juries Should Be Required In Criminal Trials.

In 1976, however, another ABA commission, the Commission on Standards of Judicial Administration,

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[4] The 1968 Standard 1.1 and its Commentary are available from the American Bar Association.

published its final draft of the *Standards Relating to Trial Courts* (hereinafter "*1976 Judicial Standards*"), in which its Standard 2.10 stated, in pertinent part, "The verdict of the jury [in criminal cases] should be unanimous."

In the Commentary to its 1976 Judicial Standard 2.10, the Commission acknowledged that this was an enlargement to the scope of the jury trial right stated in the 1968 Criminal Justice Standard 1.1, but concluded, "If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, these qualifications [in 1968 Standard 1.1] appear to be both unnecessary and unwarranted by our legal traditions." Id. at 24.[5]

The *1976 Judicial Standards* were adopted at the ABA's Midyear Meeting in February 1976. In the course of their adoption, the ABA also authorized amendment to the *1968 Criminal Justice Standards* to conform to the *1976 Judicial Standards,* specifically affirming that, "[i]n criminal cases, the verdict of the jury should be unanimous." *ABA Summary of Action of the House of Delegates, Midyear Meeting, Report of the Commission on Standards of Judicial Administration*, at 18 (1976).

Accordingly, when the 1978 edition of Volume 15 of the *Standards for Criminal Justice* (hereinafter "*1978 Criminal Justice Standards*") was published, its Introduction stated: "Incorporating the ABA Standards of Judicial Administration, this updated

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[5] The 1976 Judicial Standard 2.10 and its Commentary are available from the American Bar Association.

standard [15-1.1] has been changed by deletion of . . . (1) recogni[tion] [of] the propriety of nonunanimous jury verdicts." *1978 Criminal Justice Standards*, Introduction at 15.4.[6]

Any support that the ABA's *1968 Trial Court Standards* had lent to a position that permitted non-unanimous verdicts had thus ended, by 1976.

C. In 2005, The ABA Reaffirmed Its Commitment To Unanimous Verdicts In Criminal Trials.

Throughout the next thirty-plus years, the ABA has continued to conclude that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial.[7] Most recently, in 2004, the ABA established the American Jury Project, the result of which was the promulgation of nineteen core jury trial principles that defined the ABA's "fundamental aspirations for the management of the jury system." *ABA Principles for Juries and Jury Trials*, Preamble, at 1 (2005) (hereinafter "*2005 Jury Trial Principles*"). Principle 4.B provides that

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[6] The 1978 Criminal Justice Introduction, Standard 1.1 and its Commentary are available from the American Bar Association.

[7] See, e.g., ABA Standards Relating to Juror Use and Management (1983); ABA Standards Relating to Trial Courts (1992), ABA Standards Relating to Juror Use and Management (1993 update); and ABA Criminal Justice Standards (1996). Each is available from the ABA.

"[a] unanimous decision should be required in all criminal cases heard by a jury." *Id.* at 21.[8]

The ABA's long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury's role in the criminal justice system. Based on accumulated experiences and empirical data, and the evolved consensus of the legal community, it is the ABA's position that the "fresh look" authorized by *Apodaca* in 1972 has run its course.

II. EMPIRICAL RESEARCH, WHICH IS THE HEART OF ABA STANDARDS, SUPPORTS RECONSIDERATION OF *APODACA V. OREGON*.

A. The *Apodaca* Court Agreed On The Importance Of Thorough Jury Deliberations, Attention To Minority Viewpoints, And Community Confidence In Jury Verdicts.

Despite their differing opinions, every member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints, and community confidence in jury verdicts. The plurality,[9] concurring, and dissenting

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[8] The *2005 Jury Trial Principles, Principle 4* and its Commentary are available from the American Bar Association.

[9] The *Apodaca* plurality was joined by Justice Powell in deciding *Johnson*, making the opinion in that case one for the Court. *Johnson* involved a parallel issue but, because the trial in that case had preceded *Duncan v. Louisiana*, 391 U.S. 145

opinions disagreed, however, on the effect that non-unanimous decision rules would have on the jury's deliberative process. *Compare Johnson v. Louisiana*, 406 U.S. 356, 361 (1972) (contending that jury members would not automatically and prematurely "cease discussion and outvote a minority" under a non-unanimous decision rule), *and id.* at 374 & n.12 (Powell, J., concurring in the judgment) (predicting that community confidence in jury verdicts would not diminish under a rule permitting non-unanimous verdicts, and that such a rule would "not substantially affect[]" the jury-trial protection), *with id.* at 388 (Douglas, J., dissenting) (warning that non-unanimous verdicts "diminish[] the reliability of a jury"), *and id.* at 398 (Stewart, J., dissenting) (explaining that non-unanimous verdicts suppress consideration of minority viewpoints, and "corrode[]" "community confidence in the administration of criminal justice").

Little empirical research on jury behavior existed at the time this Court decided *Apodaca* that might have confirmed or disproved these competing predictions. Since that time, however, extensive studies have been conducted that support reconsideration of that ruling.

When the ABA revised its Criminal Justice Standards in 1978, it explained that several changes

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(1968), the applicability of the Sixth Amendment was not in question. The empirical assumptions expressed in the Court's opinion in *Johnson* therefore represent those of the *Apodaca* plurality as well as Justice Powell, who echoed these assumptions in his opinion concurring in *Johnson* and concurring in the judgment in *Apodaca*.

in the standards, including the shift to unanimous jury verdicts, were made "to reflect the experience gained in the past decade and new perspectives in the wide-ranging topic of jury trial." *1978 Criminal Justice Standards, supra*, Commentary at 15.4. In its 2005 *Principles for Juries and Jury Trials*, the ABA discussed empirical studies showing that a non-unanimous decision process reduces the reliability of jury determinations, silences minority viewpoints, and erodes confidence in the criminal justice system. *2005 Principles for Juries and Jury Trials,* Principle 4.B Commentary, *supra*, at 22. Also in the 2005 *Principles for Juries and Jury Trials*, the ABA concluded that studies had demonstrated that another justification for non-unanimity — a reduction in hung juries and retrials — was overstated. *Id.* at 23.

In light of this amassed data, which shows that the non-unanimous process in criminal jury trials does not foster thorough jury deliberations, attention to minority viewpoints, or community confidence in jury verdicts, the ABA suggests that *Apodaca*'s holding should be reconsidered.[10]

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[10] This Court has been particularly receptive to empirical evidence when assessing the constitutional contours of the jury trial right. *E.g., Ballew v. Georgia*, 435 U.S. 223, 231 n.10 (1978) (opinion of Blackmun, J.) (stating that social science research on jury size "provide[s] the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment").

B. Non-Unanimous Verdicts Reduce The Reliability Of Jury Determinations.

In the Commentary to Principle 4.B of the *2005 Jury Trial Principles*, the ABA concluded that empirical data had shown that non-unanimous decision rules materially alter jury deliberations and decrease the reliability of verdicts, stating:

> Implicit in [the historical preference for unanimous juries] is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions – ones that address and persuade every juror. Empirical assessment tends to support this assumption. Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. . . . In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached.

2005 Jury Trial Principles, *supra*, at 22 (citing Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych. Pub. Pol'y & L. 622, 669 (2001)). *See also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1262, 1273 (2000) (citing empirical research demonstrating that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable"); Reid Hastie et al., *Inside the*

Jury 60 tbl.4.1 (1983) (finding that 12-member jurors required to reach a unanimous verdict deliberated for 138 minutes on average, whereas those required to reach an 8-member majority only deliberated for an average of 75 minutes). Further, research has shown that individual jurors are themselves less confident in the decisions they reach under non-unanimous decision rules. *See* Nemeth, *supra*, at 53; Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. Cal. Interdisc. L.J. 1, 41 (1997) ("[T]he existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict.").

The ABA's review of this and other research calls into question the *Apodaca* plurality's earlier prediction that, from a functional standpoint, there would exist "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca*, 406 U.S. at 411 (plurality opinion).

C. Non-Unanimous Verdicts Allow Juries To Reach A Quorum Without Seriously Considering Dissenting Viewpoints.

Empirical studies also do not support the *Apodaca* plurality's prediction that dissenting viewpoints "will be heard" even under non-unanimous decision rules. *Apodaca*, 406 U.S. at 413 (plurality opinion); *see also Johnson*, 406 U.S. at 361 ("We have no grounds for believing that majority jurors . . . would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.").

As the ABA found, "Unanimous verdicts [] protect jury representativeness – each point of view must be considered and all jurors persuaded." *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 24 (citing Hastie et al., *Inside the Jury*, *supra*, at 45-58; Valerie P. Hans, *The Power of Twelve: the Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L Rev. 2, 23 (2001); Dennis J. Devine et al., *supra*, at 669). The ABA also concluded that "minority jurors participate more actively when decisions must be unanimous." *Id.*

Researchers have found that, in contrast to the "deliberate, ponderous atmosphere" characteristic of deliberations of unanimous juries, "larger factions in majority rule juries adopt a more forceful, bullying, persuasive style," possibly "because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." Hastie et al., *supra*, at 112; *see also* Saks, *supra*, at 40 ("Compared to unanimous rule juries, quorum rule juries have been found to deliberate less equitably (that is, the distribution of talking is skewed more extremely, with the talkative jurors talking more and the untalkative talking less than in unanimous rule juries).").

Further, evidence indicates that women and racial minorities are particularly likely to hold dissenting viewpoints on juries that are discounted under a non-unanimous decision rule. *See* Taylor-Thompson, *supra*, at 1264 ("If—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference

on the jury."). As Justice Stewart warned, "Under [*Apodaca* and *Johnson*], nine jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting). In related areas implicating Sixth Amendment rights, this Court has stringently protected the participation of women and minorities on juries. *See, e.g.*, *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 135 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

Researchers also have found that permitting non-unanimous verdicts "discourage[s] meaningful examination of opposing viewpoints" and thus "impoverishes deliberations." Taylor-Thompson, *supra*, at 1264. Further, as panels are required to reach unanimity, "jurors at the extremes may be driven to a compromise, which they would otherwise reject, and a fairer verdict may result." 1996 Criminal Justice Standards, *supra*, Standard 15-1.1 Commentary, at 126 (citing Edwin P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 Geo. L.J. 775 (1992).

As then-Circuit Judge Anthony Kennedy recognized in 1978, unanimous decision rules facilitate deliberation by ensuring that dissenting voices are heard and accepted or rejected, thus lending "particular significance and conclusiveness to the jury's verdict." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

D. Non-Unanimous Verdicts Undermine The Community's Confidence In The Justice System.

Empirical evidence similarly undercuts Justice Powell's prediction in *Apodaca* that unanimous jury verdicts would not be "entitled to greater respect in the community." *Johnson*, 406 U.S. at 374 (Powell, J., concurring in the judgment). Instead, research has demonstrated that a non-unanimous decision rule "fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system." *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 22 (citing Taylor-Thompson, *Empty Votes In Jury Deliberations*, *supra*, at 1273). *See also* Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 Law & Hum. Behav. 333, 337-38 & tbl.1 (1988) (citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer); Barbara A. Babcock, *A Unanimous Jury Is Fundamental to Our Democracy*, 20 Harv. J.L. & Pub. Pol'y 469, 472 (1997) (the need to reach consensus promotes the credibility of the judgment because "[a] unanimous verdict is a major accomplishment and carries with it moral authority that a split decision lacks"); Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 182 (1994) (unanimity serves as a "pillar of popular faith in the legitimacy and accuracy of jury verdicts").

As then-Circuit Judge Anthony Kennedy recognized in 1978, "[b]oth the defendant and society can place special confidence in a unanimous verdict." *Lopez*, 581 F.2d at 1341.

E. The Connection Between Unanimity And Hung Juries Has Been Overstated.

Justice Powell's opinion in *Apodaca* suggested that eliminating unanimity requirements "could well minimize the potential for hung juries occasioned either by bribery or juror irrationality." *Johnson*, 406 U.S. at 377 (Powell, J., concurring in the judgment). Studies of hung juries largely negate those concerns, however, and instead bolster arguments favoring unanimity.

The ABA's research has shown that juries rarely hang because of one or two obstinate jurors. *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 23 (citing Taylor-Thompson, *Empty Votes In Jury Deliberations*, *supra*, at 1317 (2000). To the contrary, "[g]enerally, when deadlocks occur, they reflect genuine disagreement over the weight of the evidence and arise within juries that had substantial differences in verdict preference at the outset of deliberations," *id.* (citing Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?*, National Center for State Courts (2002), at 7, *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesExecSumPub.pdf.; Hastie et al., *Inside the Jury*, *supra*, at 166-67; and Saks, *supra*, at 41).

As other research shows, eccentric or irrational holdout jurors do not normally derail unanimity. Instead, "[t]he majority of hung juries in criminal

cases in which unanimity is required do not reflect a lone holdout or even two dissenters, but rather a more evenly divided final vote." Diamond et al., *supra*, at 228. Juries tend to deadlock only when there is a "massive minority of 4 or 5 jurors" – rather than just one or two holdouts – at the beginning of the deliberative process, even if the number of dissenters is later reduced. *See* Kalven & Zeisel, *supra*, at 462.

Further, it is the complexity of the case that affects the likelihood of jury deadlock: one study found the incidence of hung juries to be ten percent in close, difficult cases, but only two percent in clear, easy cases. Kalven & Zeisel, *supra*, at 457. In fact, in a study of civil cases, the judges agreed with holdout jurors over forty percent of the time when a non-unanimous verdict was rendered, and disagreed with the jury in approximately twenty percent of the cases in which the verdict was unanimous. Diamond et al., *supra*, at 222. "[T]he agreement between the judge and the holdout jurors on a substantial number of cases suggests that the conflict on some of these juries posed precisely the kind of challenge to the majority position that a deliberative process should welcome." *Id.*

Finally, research has shown only a small increase in the number of hung juries when jury unanimity is required: one survey of trial judges found that only 5.6% of criminal juries hang when unanimous verdicts are required, while 3.1% deadlock when majority verdicts are allowed. *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 23 (citing Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 461 (1966)). The costs of hung juries

also are exaggerated, as shown by a study of California cases in which only twenty-six percent of cases in which the jury deadlocked resulted in a retrial; all other cases were disposed of by guilty plea or dismissal. Leo J. Flynn, *Does Justice Fail When the Jury is Deadlocked?*, 61 Judicature 129, 133 (1977).

As a recent comprehensive study of hung juries reported, eliminating unanimous decision rules for jury verdicts "would be unlikely to tap the true causes of hung juries: evidentiary factors, problematic deliberations, and juror attitudes about fairness." Hannaford-Agor et al., *supra*, at 7.

Because the ABA's review of research into the non-unanimous jury process does not support a conclusion that it reduces hung juries, the ABA lends its support to the petitioner's request that *Apodaca* be revisited.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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